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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

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No. 269

EARL PRICE,

Petitioner,

vs.

GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 269

EARL PRICE,

Petitioner,

vs.

GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE PETITIONER

Opinions Below

The Supreme Court of the State of Georgia denied the application for a writ of certiorari to review the judgment of The Court of Appeals of Georgia. The denial is unreported and is docketed as Case No. 24,879 and dated September 24th, 1968 (A. 53 & 61).

The decision of The Court of Appeals of Georgia which was decided June 25th, 1968 adverse to Petitioner, and also their decision on a Motion for Rehearing which was denied July 24th, 1968, to which application for certiorari

was filed in The Supreme Court of Georgia is reported as *Price* v. *The State of Georgia,* Case No. 43,747 at 118 Ga. App. 207—163 S.E. 2d 243 (1968) (A. 35-36-37-38 & 39).

The opinion of The Court of Appeals of Georgia reversing the first conviction of Petitioner is reported as *Price* v. *The State of Georgia,* Case No. 40,272 as 108 Ga. App. 581—133 S.E. 2d 916 (1963).

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S.C.A. 1257 (3), since the validity of State Statutes and prior State decisions on grounds of repugnancy to the Constitution of The United States and Amendments thereto are drawn in question. Certiorari was denied by The Supreme Court of Georgia on September 24th, 1968 (A. 53 & 61). The present case was docketed in The Supreme Court of The United States December 11th, 1968, as Case No. 1254—Misc., October Term 1968, now Case No. 269 October Term 1969. The time for applying for the writ of certiorari to The Supreme Court of The United States was within the period of time as required under Title 28 U.S.C.A. 2101 (d) and Rule No. 22 (1) of The Supreme Court of The United States.

Constitutional Provisions Involved

UNITED STATES CODE ANNOTATED "CONSTITUTIONAL AMENDMENTS 1 TO 5," PAGES 297 AND 318. AMENDMENT V CAPITAL CRIMES: DOUBLE JEOPARDY: SELF-INCRIMINATION: DUE PROCESS: JUST COMPENSATION FOR PROPERTY. "No per-

son shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

UNITED STATES CODE ANNOTATED "CONSTITUTIONAL AMENDMENTS 6 to 14." PAGES 288 AND 383, AMENDMENT XIV SECTION 1. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATIVES; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT ENFORCEMENT. SECTION 1—All persons born or naturalized in The United States, and subject to the jurisdiction thereof, are citizens of The United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of The United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Questions Presented for Review

The questions presented are:—

(1)—That the Courts of the State of Georgia misconstrued the statutes and decisions with reference to double jeopardy.

(2)—Does the double jeopardy provision of the Fifth (V) Amendment of The Constitution of The United States apply to State cases by and through the Fourteenth (XIV) Amendment? Are these two Amendments binding upon the States?

(3)—When a person has been indicted for murder and convicted of voluntary manslaughter, if he voluntarily seeks and obtains a new trial, is he subject to another trial for the offense of murder charged in the same indictment, and upon such a trial can he successfully interpose a plea of former acquital of the crime of murder or former jeopardy in regard thereto?

(4)—Has there been a denial of Petitioner's right by the Courts of Georgia under the Fifth (V) and Fourteenth (XIV) Amendments of The Constitution of The United States?

(5)—In addition to the questions presented above by Petitioner in Certiorari and in the petition for a writ of certiorari, The Supreme Court of The United States in granting certiorari on June 23rd, 1969, requested that counsel for Petitioner in certiorari brief and argue the question of retroactivity of the case of *Benton* v. *Maryland,* 395 U.S. ——— (decided by the Court June 23rd, 1969) and whether that decision is applicable to the case now before the Court.

Statement of Case

The First Trial

At the October, 1962 Term of The Superior Court of Effingham County, Georgia, Petitioner in certiorari was indicted by a Grand Jury for the offense of murder (A. 8-9 & 28-29). On October 17th, 1962, Petitioner in certiorari was tried for murder under the indictment before a trial jury and the jury returned a verdict of guilty of voluntary manslaughter the sentence being fixed by the trial Jury from 10 to 15 years in the penitentiary (A. 10 & 30).

Petitioner in certiorari voluntarily appealed to the Court of Appeals of Georgia Case No. 40,272, *Price* v. *State of Georgia,* 108 Ga. App. 581, 133 S.E. 2d 916 (1963). The case was reversed on an erroneous charge by the trial Judge to the petit Jury (A. 21).

The Second Trial

On October 20th, 1967, Petitioner in certiorari was again placed on trial for murder under the same indictment obtained at the October 1962 Term of The Superior Court of Effingham County, Georgia and for the same alleged offense of murder for which he had been tried at the October, 1962 Term of The Superior Cou t of Effingham County, Georgia, before a petit Jury and the Jury again found Petitioner in certiorari guilty of voluntary manslaughter (A. 11). The Sentence fixed by the Jury at the second trial was 10 years (A. 11).

Prior to the second trial, counsel for Petitioner in certiorari filed in The Superior Court of Effingham County,

Georgia, a plea of Autrefois Acquit, pleading that to again try Petitioner in certiorari for murder under the same indictment for the same alleged offense of murder would be double jeopardy in view of his conviction at the first trial, of voluntary manslaughter (A. 5-6-7). Argument was had in the Court on the Pleas and Motion (A. 13 thru 27) October 19th, 1967, the day prior to the actual trial of the second case, and the Plea and Motion were denied by the trial Judge (A. 11). During the second trial and in the Court's charge to the petit Jury, the trial Judge gave the Jury the definition of murder under Georgia Law (A. 31).

From the second trial and conviction of Manslaughter, Petitioner in certiorari appealed to The Supreme Court of Georgia (A. 32-33). The case was transferred to the Court of Appeals of Georgia since "only questions as to the application of plain and unambiguous provisions of the Constitution" were involved. *Price* v. *State,* 224 Ga. 306.

The second case having been transferred to the Court of Appeals of Georgia, from the Supreme Court of Georgia, on the appeal, the Court of Appeals of Georgia, *Price* v. *State of Georgia,* 118 Ga. App. 207, 163 S. E. 2d 243 (1968) the Court affirmed the lower or trial Court (A. 35-36) on all eight Enumeration of Errors (A. 32-33) filed with the appeal, two of which are now before this Honorable Court for determination and set out in this brief. The Judgment of the Court of Appeals of Georgia is a part of the record (A. 39). On motion for a rehearing in the Court of Appeals of Georgia (A. 40 thru 49) the Court on July 24th, 1968 rewrote their first opinion at which time the motion for a rehearing in the Court of Appeals of Georgia was denied (A. 37-38 & 39). Subsequent to the denial of the motion

for a rehearing, notice of intention to certiorari to The Supreme Court of Georgia (A. 51-52) was filed with the Court of Appeals of Georgia and the Supreme Court of Georgia denied certiorari on September 24th, 1968 (A. 53).

Notice of intention to apply to The Supreme Court of The United States for a writ of certiorari was filed with The Court of Appeals of Georgia within the time allowed by law (A. 1-2 & 3). A petition for a writ of certiorari to The Supreme Court of The United States was filed in this Honorable Court together with a motion for leave to file certiorari in forma pauperis and the case was docketed December 11th, 1968 as No. 1254 Misc., October Term 1968. On June 23rd, 1969, The Supreme Court of The United States granted the motion for leave to proceed in forma pauperis and the petition for a writ of certiorari and the case is now before this Honorable Court for determination and is now known as *Earl Price* v. *Georgia*, No. 269, O.T. 1969.

ARGUMENT

I.

The Provision Against Prosecution of a Defendant Twice for the Same Offense, Set Forth in the Fifth Amendment Should Apply, Through the Fourteenth Amendment, to All State Prosecutions, and Should Be Binding Upon the States.

There is set out in this brief and the petition for a writ of habeas corpus to The Supreme Court of Georgia, filed in this Honorable Court four questions for review by the Court. There is, however, only two issues present in this case and in the questions listed for review. The first issue in this case, is whether or not the Double Jeopardy provision of the Fifth Amendment to the Constitution of The United States is applicable to state prosecutions by and through the Fourteenth Amendment. The other issue is that if the Fifth Amendment's provision against Double Jeopardy is applicable and binding upon the states, then was Petitioner in certiorari twice put in jeopardy when he was tried for murder the second time under the same indictment when he was convicted of voluntary manslaughter at the first trial, the first trial and conviction having been reversed by The Court of Appeals of Georgia.

The Fifth Amendment prohibition against Double Jeopardy is a part of The Bill of Rights and is among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment. Due Process of Law is secured against invasion by the Federal Government by The Fifth Amendment and is safeguarded

against state action in identical words of The Fourteenth Amendment. In the case of *Gideon* v. *Wainwright*, 372 U.S. 335, 343 the Court concluded that certain, fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process clause of the Fourteenth Amendment. Certainly if a part of the Fifth Amendment, such as "private property shall not be taken for public use without just compensation" and "one not being compelled in any criminal case to be a witness against himself" which have by this Honorable Court been declared to be fundamental personal rights, then certainly that portion of The Fifth Amendment with regard to Double Jeopardy should be declared as a fundamental personal right and liberty to be protected by the Due Process Clause of The Fourteenth Amendment. In the case of *Malloy* v. *Hogan*, 378 U.S. 1, 10 (1964) the Court said "If the Fifth Amendment's prohibition against Double Jeopardy applies to state prosecutions, then the Federal Standard for enforcement of this protection must be complied with."

In the case of *Benton* v. *Maryland*, 395 U.S. —— (not yet reported) decided by this Honorable Court on June 23rd, 1969, held that on the merits of the case that the Double Jeopardy Clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment. The Double Jeopardy clause has now been declared by this recent decision to be a fundamental personal right to be protected by the due process clause of the Fourteenth Amendment. In citing the *Benton* case counsel for Petitioner in certiorari is aware of the fact that the Court has requested Petitioner in certiorari to brief and argue the question of retroactivity of the *Benton* case and whether

or not the *Benton* decision is applicable to the case now before the Court. This will be undertaken in this Brief later on. To use the language of the Court, the Court said "We today find that the Double Jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our Constitutional heritage, and that it should apply to the states through the Fourteenth Amendment."

The position of the State of Georgia is that "When a person has been indicted for murder and convicted of voluntary manslaughter, if he voluntarily seeks and obtains a new trial, he is subject to another trial *generally* for the offense of murder charged in the indictment and that upon such trial he cannot successfully interpose a plea of former acquittal of the crime of murder or former jeopardy in regard thereto." Cited by the State of Georgia is the case of *Brantley* v. *State of Georgia,* 132 Ga. 573 (64 S.E. 676) affirmed in *Brantley* v. *State of Georgia,* 217 U.S. 284 (1910). See *Price* v. *State of Georgia,* 118 Ga. App. 207—163 S.E. 2d 243 (1968).

The State of Georgia further contends in their Brief in opposition to Petitioner's petition for a writ of certiorari as requested of the State by this Honorable Court that in addition to the *Brantley* case, that the Double Jeopardy under the Fifth Amendment to the Constitution applies only to Federal Jurisdiction and they cite as authority the case of *Polko* v. *Connecticut,* 302 U. S. 319; *Twining* v. *New Jersey,* 211 U.S. 78 and *Brock* v. *North Carolina,* 344 U.S. 424, 426 (1953). What the State of Georgia has overlooked is that the *Brantley* case was decided in the year 1910 when the Courts of our great nation were not as much concerned as they are now in the year 1969 about the con-

stitutional rights of the citizens of this Country. This is a new day. The *Polko* case doctrine has been rejected by the recent decisions of this Court, in fact not only the *Polko* case but also the *Twining* case and the *Brock* case have all been cut away.

The *Polko* decision and reasoning should not be followed because the Double Jeopardy guaranty is in fact as much a fundamental principle of liberty and justice as other provisions of the Bill of Rights which have been made applicable to the states through the Fourteenth Amendment. Since the *Polko* case other amendments of the Constitution have been made applicable to the states, all a part of the Bill of Rights, through the Fourteenth Amendment. For example, the First Amendment (Freedom of the Press), *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); The Fourth Amendment (unreasonable searches and seizures by state government) *Mapp* v. *Ohio*, 367 U.S. 643 (1961); The Fifth Amendment (Protection against deprivation of property without just compensation) *Chicago B & O R.R. Co.* v. *City of Chicago*, 166 U.S. 226 (1897); Fifth Amendment (Protection against self-incrimination) *Malloy* v. *Hogan*, 378 U.S. 1; Sixth Amendment (right to assistance of counsel in criminal cases) *Gideon* v. *Wainwright*, 372 U.S. 335 (1962); Eighth Amendment (protection against cruel and unusual punishment) *Robinson* v. *California*, 370 U.S. 660 (1962).

The history of the "Double Jeopardy" protection indicates that it is a "fundamental principle of liberty and justice which lies at the base of all our civil and political institutions. In the case of *United States* v. *Wilkins*, 348 F 2d 844, 850 the Court said "Abhorrence to successive re-

prosecutions is deeply rooted in our common law traditions, and the Bill of Rights curb on the power of the Federal Government to reprosecute is ample recognition of how central this abhorrence is to our constitutional concept of justice."

The Fourteenth Amendment says to the states with reference to the Bill of Rights that if you violate these rights, the state has exceeded the limit of your power and your doing is wrong and is void. The purpose and the intent of the Congress in the passage of the Fourteenth Amendment were to give Congress the power to enforce the Bill of Rights against state deprivation of those rights since, up to the time of the Fourteenth Amendment there was no power to enforce the Bill of Rights in the states. The fact remains that in the present case, the State of Georgia did not comply with the Double Jeopardy provision of the Fifth Amendment rather chose to apply a ruling of The Supreme Court of Georgia made or held in the year 1910. In recent years this Court has overruled many of the old decisions on the Bill of Rights. The *Malloy* case in fact undermined the *Twining* case decision against self-incrimination as set out in the Fifth Amendment thus prohibiting the state from infringement on the privilege of a fundamental right. This being true, then why not make the Double Jeopardy provision of the Fifth Amendment as meaningful as the Court has done in recent years to other provisions of the Fifth Amendment? There are many other rulings and decisions of this Honorable Court, too many to mention here, that have protected the fundamental rights and liberties of the citizens of this country that heretofore several states have ignored. The Bill of Rights was written and adopted and so was the Fourteenth Amendment

and they were for the protection of the citizens living in this country.

The Court has now said in the *Benton* case, decided June 23rd, 1969, that the Double Jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage and that it should apply to all of the states through the Fourteenth Amendment. If this new doctrine or ruling of the Court applies to John Dalmer Benton, who apparently was subjected to double jeopardy prior to the ruling in his (the *Benton* case) case, then why would it not apply in the case now before the Court, if the Petitioner in certiorari was so subjected in the Georgia Courts. It might here for the moment be said that the ruling in the *Benton* case was in fact itself as to its application, retroactively applied, because Benton was placed in double jeopardy prior to this decision.

It has been said by the Court in the case of *Elkins* v. *United States,* 364 U.S. 206 at 221 in the year 1960, that "The very essence of a healthy Federalism depends upon the avoidance of needless conflict between the State and Federal Courts." The mere outlawing of a dual and conflicting system should, as stated in the *Elkins* case, be brought to a speedy conclusion. It is apparent that the advantage of such incorporation far outweigh the disadvantages.

The doctrine of "res judicata" in civil cases appears to be a counterpart to double jeopardy. It was stated in the case of *United States* v. *Oppenheimer,* 242 U.S. 85, that an adjudication should be considered final and binding between the same parties on the same question, as a fundamental principle of justice. This case further stated that

the principle of res judicata is a "fundamental principle of Justice" and therefore applies to state criminal proceedings through the Fourteenth Amendment due process of law clause.

Since the passage of the Fourteenth Amendment was to give Congress the power to enforce the Bill of Rights upon the states and the entire Fifth Amendment is a part of The Bill of Rights, then why not now apply the intent and purpose of the Fourteenth Amendment and force the states to abide by the Bill of Rights in its entirety? If it was the law in that day and the day of John Dalmer Benton (the *Benton* case), then certainly it is the law today and has been prior to the turn of the century.

It is submitted that for the reasons herein set out the "Double Jeopardy" protection of the Fifth Amendment by and through the Fourteenth Amendment should be applied to the case now before the Court, provided Petitioner in Certiorari was twice tried for murder under the same indictment for the same offense, as will be shown in Part II of this Brief.

In conclusion of Part I of this Brief, Petitioner in Certiorari calls the Court's attention to the case of *United States of America ex rel. George Hetenyi, Relator-Appellant* v. *Walter H. Wilkins, Warden of Attica Prison,* 348 Fed. Reporter 2d Series 844, where the Second Circuit Court of Appeals in a *New York State case* held that "Guarantee against double jeopardy is a fundamental right within the doctrine of selective incorporation of The Bill of Rights, those that are fundamental, are absorbed by due process clause of the Fourteenth Amendment and are thus made applicable to the states." This case was reversed by the

Circuit Court of Appeals of the Second Circuit and held that the Double Jeopardy of The Fifth Amendment was applicable to State Courts through the Fourteenth Amendment. This case on certiorari went to this Honorable Court from the Second Circuit Court of Appeals, *Mancusi, Warden (Wilkins, Warden)* v. *George Hetenyi,* 383 U.S. 913, 15 L ed 667. The Writ of Certiorari was denied by this Honorable Court. As stated this case is a state case out of the State of New York. Certainly the State of Georgia is bound by this ruling of The Circuit Court of Appeals under Article XII of The Georgia State Constitution, Code Section 2-8001—The Supreme Law, the Laws of The United States in pursuance thereof.

It is felt that the Court should apply the ruling in the *Benton* case decided June 23rd, 1969, to the present case now before the Court.

II.

Petitioner in Certiorari Was "Twice Put in Jeopardy" and His Conviction at the Second Trial Was Null and Void Under the Fifth Amendment Standards.

Petitioner's plea of Autrefois Acquit or Plea of Former Jeopardy, as was said in the *Benton* case "was grounded on the universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offense." The question now is "Was Petitioner in Certiorari twice put in Jeopardy when he voluntarily sought and did get a reversal of his first conviction of Voluntary Manslaughter the results of being tried for murder, when he was again tried for murder,

the second time, when he was again convicted of Voluntary Manslaughter under the same indictment and for the same alleged offense of murder and the same trial Court."

The State of Georgia relies upon the case, *Brantley* v. *The State of Georgia,* 132 Ga. 573 which was in fact affirmed by this Court in 217 U.S. 284, 54 L ed 768 (1910), contending that the mere fact that Petitioner in Certiorari voluntarily sought and obtained in the Court of Appeals of Georgia a reversal of his first trial on an error in the charge to the Jury, that he was by this act, subject to being again tried for murder even though he was convicted of Voluntary Manslaughter at the first trial. See *Price* v. *Georgia,* 118 Ga. App. 207 S.E. 2d 243 (1968).

In the case of *Cichos* v. *Indiana,* 385 U.S. 76, 17 L ed 2d 175, Mr. Justice Fortas with whom The Chief Justice and Mr. Justice Douglas joined, in a separate opinion stated that to try one for murder the second time after his conviction of second degree (voluntary manslaughter) he was exposed to the hazards of prosecution and conviction for the more onerous crime, and second it gave the prosecution the advantage of offering the Jury a choice—a situation which is apt to induce a doubtful Jury to find the Defendant guilty of the less serious offense rather than to continue debate as to his innocence. This doctrine was also stated in the *Hetenyi* v. *Wilkes,* 348 F 2d 844 (a New York State case) in the Second Circuit Court of Appeals.

In the case of *Green* v. *United States,* 355 U.S. 184, 2 L ed 2d 199 Defendant Green was not acquitted of first degree murder charge at the first trial. Just as in the present case before the Court, the Jury did not return a verdict on that Count, but convicted Green on the lesser charges

of arson and second degree murder. The Court held that Green could not be retried on the first degree murder charge. The Court clearly and unmistakably held that whether Green was acquitted of the greater offense (murder) was of no consequence. He had been exposed to jeopardy. So it is in the present case before the Court. It is of no consequence whether the silence of the Jury on the murder charge amounted to acquittal. Petitioner was put in jeopardy on the murder charge and he cannot again be tried on that charge (murder). In fact the *Green* case held that Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gauntlet once on that charge and the Jury refused to convict Green of murder (First Degree). It was further said in the *Green* case that Green's jeopardy for First Degree murder came to an end when the Jury was discharged so that he could not be retried for that offense. The Court further said in the *Green* case that the Court was of the opinion that the case can be treated no differently, for purposes of Former Jeopardy, than if the Jury had returned a verdict which expressly read: "We find the Defendant not guilty of murder in the first degree but guilty of murder in the second degree." The language stated above is that expressed by the Court in the *Green* case. This is exactly the position of Petitioner in the case now before the Court. Petitioner in Certiorari was tried for murder and convicted of voluntary manslaughter. The verdict of the Jury which stated that "We the Jury find the Defendant guilty of voluntary manslaughter and fix his sentence at from 10 to 15 years" (A. 10), was equivalent to or the same as if the Jury returned a verdict to read "We the Jury find the Defendant not guilty of mur-

der but guilty of manslaughter." The case of *United States ex rel. Hetenyi* v. *Wilkins*, 348 Fed. 2d 844, Second Circuit Court of Appeals (1965), certiorari denied by this Honorable Court, 383 U.S. 913, 15 L ed 2d 667, took the same position as outlined in the *Green* case and in fact the opinion as written by the Court made specific reference to the *Green* case. Now this Honorable Court has said in the *Benton* case decided June 23rd, 1969, that the Double Jeopardy Clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment. This Petitioner in Certiorari says is the law in his case now before the Court. Petitioner objected and filed his plea of Autrefois Acquit, a plea of former jeopardy and it was denied in the trial Court and Petitioner was again tried for murder. This is a violation of Petitioner's rights under the Fifth Amendment and on the decisions above in the *Green* case and the *Hetenyi* case, the present case now before the Court should be reversed. In the *Green* case the Government contended, that Green waived his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a successful appeal of his improper conviction of second degree murder. This is exactly the position of the State of Georgia in the present case now before the Court. The Court further said in the *Green* case that they could not accept this paradoxical contention. Now the *Benton* case has settled the question once and for all. One cannot be put in jeopardy twice for the same offense in State Courts. It is clear in view of the *Green* case and the *Hetenyi* case that this was the law of the land as far back as the birth of the Fourteenth Amendment before the turn of the century and should be applied in the present case. Mr. Justice Fortas along with the Chief Justice and Mr. Justice

Douglas in the *Cichos* case well stated the law as they saw it with reference to Double Jeopardy in 1966. The *Green* case and the *Hetenyi* case did in effect repeal the *Brantley* case upon which the State of Georgia rests its case.

Article XII Laws of General Operation of Force in The State Constitution of The State of Georgia, Section 1, Laws of Force (Code Section 2-8001) reads as follows:—Paragraph I, Supreme Law—The Laws of General Operation in this state are, first:—As the Supreme Law:—The Constitution of The United States, the Laws of the United States in pursuance thereof and all treaties made under the authority of The United States.

The State of Georgia by the Section of The Georgia Constitution above quoted is bound by the decisions of the *Green* case and the *Hetenyi* case, the latter being a Circuit Court of Appeals decision. Both of these cases are Laws of The United States in pursuance thereof to the Federal Constitution.

The Fourteenth Amendment forbids the states to deprive persons of life, liberty and property without due process of law, and that no state shall abridge the privileges or immunities of citizens of the United States. While there has never been a majority of the members or Judges of The Supreme Court of The United States willing to subscribe to the view that the Fourteenth Amendment requires a blanket application of the entire Bill of Rights to the states, the Fifth Amendment, all of it, being one of the Bill of Rights, but leaves to posterity the determination of just what the Amendment protects, the fact yet remains that The Supreme Court of The United States in many cases has almost without exception taken the

position that the Fifth Amendment is applicable to state cases by and through the Fourteenth Amendment where other and certain provisions of the Fifth Amendment were in issue. This is also true of other portions of The Bill of Rights where certain issues of The Bill of Rights were in question with regard to state application. This being true, then why would not this same trend of the Court be applied in the present case? It was applied in the *Benton* case.

It is urged by Petitioner in Certiorari that this Honorable Court grant to him the same relief as was given to Benton in his case and under the same prior decisions of this Court as pointed out in this case and the *Benton* case. If the Bill of Rights, the Fifth Amendment, applied in the *Benton* case certainly under the facts and the law, the facts, being almost identical in each case, should be applied to the present case now before the Court.

There are many other cases that might be called to the attention of the Court where the Court almost without exception, has taken the position that the Bill of Rights apply to the states. This has been done by a cumulative process instead of the en bloc approach. To mention other cases not up to now herein mentioned, might Petitioner in certiorari mention them now. The case *Douglas* v. *California,* 372 U.S. 353, on the Sixth Amendment; *Miranda* v. *Arizona,* 384 U.S. 436, on a portion of The Fifth Amendment, "self-incrimination"; and the case of *Whitus* v. *Georgia,* 385 U.S. 545, on discrimination with regard to selection of Grand and Petit Juries.

As stated the *Benton* case has now made the "Double Jeopardy" section of the Fifth Amendment applicable to

the states. It should be applied accordingly in the present case now before the Court and it is so urged by Petitioner in Certiorari. The *Green* case decided December 16th, 1957, covers in full the facts in the present case and stated what the law was, prior to Petitioner's indictment in the lower and trial Court. The Court in the *Green* case said "Once a person has been acquitted of an offense, he cannot be prosecuted again on the same charge."

III.

Retroactivity of Benton v. Maryland Decided by the Court June 23rd, 1969, and Whether or Not That Decision Is Applicable to the Present Case.

Petitioner in Certiorari in argument on the retroactivity of the *Benton* case and its applicability to the present case now before the Court respectfully takes the position that the *Benton* case is not a new law or rule, in that the Court in the *Benton* case merely stated what the law was and how it should be applied by the states. The doctrine or decision stated by the Court in the *Benton* case has been the law ever since the birth of the Bill of Rights, and the Fourteenth Amendment. The states, which includes the State of Georgia, have failed to apply the law, the Bill of Rights in every instance where possible where prosecutions of this kind are concerned. It appears that it takes the might and power of The Supreme Court of the United States to see and demand the states to recognize these fundamental rights safeguarded by the Bill of Rights and the Fourteenth Amendment. In all fairness and in the name of justice, it is respectfully submitted that in the instant case, the court need not and should not concern itself with

the question of retroactivity of the *Benton* case because the law as stated and set out in the *Benton* case has been the law and was at the time Petitioner in certiorari was subjected to Double Jeopardy. When the Fourteenth Amendment ratification was announced in the Congress, it then put in operation the tool with which to enforce the Bill of Rights upon the states. The Bill of Rights said what it meant and so did the Fourteenth Amendment. Petitioner in Certiorari cannot too strongly insist and say that the law, the violation of the law, the Bill of Rights, the Fifth Amendment and the Fourteenth Amendment, of which he complains, was the Supreme Law of the land long prior to the time of his first trial for murder in October, 1962. For this reason Petitioner in Certiorari went to great length and into detail in his argument in this brief in argument of the two questions presented and now before this Court on the two Amendments, the Fifth and the Fourteenth and their application to his case and the violation of his constitutional rights. If the Fifth Amendment and the Fourteenth Amendment were applicable and the law in the *Benton* case, then why should they not be the law in Petitioner's case now for determination in this Court? There must be a first in every undertaking of man and the *Benton* case appears to be the first time a majority of the Justices of The Supreme Court has ruled on the applicability of the Fifth Amendment. This Court has merely said in the *Benton* case to the State of Maryland, that your doing is wrong and unlawful; you exceeded the limit of your power and we, this Court, now instruct you, Maryland, to comply with the Bill of Rights and the Supreme Law of the land.

So it is in the present case before the Court. The State of Georgia should likewise be told by this Court that you have exceeded the limit of your power and that you are wrong in your doing and in taking the position that just because Petitioner in Certiorari voluntarily sought and did obtain a new trial upon an illegal conviction the first time, he had waived his right to plead Double Jeopardy, relying on a 1910 decision of The Supreme Court of Georgia, the *Brantley* case. This is a new day and it would appear that it would be quite unfair to deny Petitioner in Certiorari the protection of the Bill of Rights and the benefit of the Fourteenth Amendment when it was the law at the time and when Benton was given and granted relief. Respectfully, it is felt that this Court in the *Benton* case has not established or announced a new law by its decision in the *Benton* case. It is merely a directive to the State of Maryland and all of the other states. "Comply with the law, the Bill of Rights and the Fourteenth Amendment, Maryland, Georgia, and all others." "It has been the law all the time, now apply it."

As was said by Mr. Justice Harlan in the case of *Desist v. United States* decided by this Court March 24th, 1969, as appearing in the advance sheet as 22 L ed 2d 248, 263 "First it is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law."

It would be unfair and certainly discriminatory to give new trials for unconstitutional convictions when others are

kept in prison without any hope whatsoever of relief or release though their complaint is equally meritorious. "The Federal Constitution neither prohibits nor requires retrospective effect for decisions expounding new constitutional rules affecting criminal trials,"—Headnote seven (7) of the *Desist* case. The Court in the case of *Linkletter* v. *Walker*, 381 U.S. 618, 629, 14 L ed 2d 601, 608 established, as stated in this Brief, "the Constitution neither prohibits nor requires retrospective effect" for decisions expounding new constitutional rules affecting criminal trials.

As was stated by Mr. Justice Douglas in the dissenting opinion in the *Desist* case, it was a mystery to him why *Katz* v. *United States*, 389 U.S. 347 which was given retroactive effect to petitioner Katz will not be given retroactive effect to Petitioner Desist. Mr. Justice Douglas further stated "that does not seem to me to be the administration of justice with an even hand, that he would have understood the ruling in the *Desist* case had the Court announced a new constitutional search and seizure rule to be applied prospectively in all cases."

To say that the decision in the *Benton* case is not to be retroactively applied in the present case it would appear that the Court would be denying Petitioner the benefit of a fundamental Constitutional guarantee which was granted Benton. The *Benton* case has simply applied a well established constitutional principle that has been the law since the adoption of the Bill of Rights and the Fourteenth Amendment long before the turn of the century. Mr. Justice Fortas in the *Desist* case said—"In my judgment the Court's holding is of pervasive importance because it adds new and unhappy dimensions to the non-retroactivity

doctrine. The Court not only denies the benefit of a fundamental constitutional provision, and not merely of Court-made rules implementing a constitutional mandate or of a statutory principle to a class of persons because of the chance operation of the judicial calendar; it does so in the face of the fact that the ruling at issue is neither novel nor unanticipated." Mr. Justice Fortas further pointed out in his dissent in the *Benton* case that the Court has insisted that all persons, not those just selected by the chance of the calendar, receive the benefit of newly-declared constitutional commands that are central to the reliability of the fact-finding process at trial and without which innocent persons may have been adjudged guilty. He cites numerous decisions of this Court to sustain his allegation too numerous to mention in this brief appearing on page 269 of the *Desist* case reported in 22 L ed 2d 248.

Mr. Justice Harlan in the *Benton* case dissenting in the Court's decision stated that "Again, although it has been said that a decision will be retroactively applied when it has been clearly foreshadowed in our prior case law" quoting *Johnson* v. *New Jersey, supra* at 731, 16 L ed 2d at 891; *Berger* v. *California,* 21 L ed 2d 508 "the Court today (*Desist* case) rejects such a contention." He further said that, "Indeed, the Court now also departs from pre-existing doctrine in refusing retroactive application within the Federal system of the new rule ultimately laid down in *Katz* v. *United States,* 389 U.S. 347, despite its concession that relatively few federal cases would have to be reconsidered."

Petitioner in certiorari understands the Court's language in the *Desist* case in commenting on the rule set out

in the *Linkletter* case establishing that the Constitution neither prohibits nor requires retrospective effect for decisions expounding new constitutional rules affecting criminal trials, the Court having viewed the retroactivity or non-retroactivity of such decisions as a function of three considerations which were recently summarized in *Stovall* v. *Denno,* 388 U.S. 293, 297. The three considerations or the criteria guiding resolution of the question implicate (a)—the purpose to be served by the new standard; (b)—the extent of the reliance by law enforcement authorities on the old standards; and, (c)—the effect on the administration of justice of a retroactive application of the new standards. The question is whether or not the *Benton* case with regard to retroactivity stated a new constitutional rule or did the decision merely state what the law in such cases was, which Petitioner says was the law since the adoption of the Fourteenth Amendment, or was it a directive to the State of Maryland to comply or apply the law. Petitioner in Certiorari feels that the *Benton* case was an announcement by the Court as to what the law in the case was, something that the majority of the Court had not before had the opportunity, or did not elect, to rule on in regard to the Double Jeopardy clause of the Fifth Amendment. Has this decision not been the law since the adoption of the Fourteenth Amendment? It would appear that if the Court takes the position in the present case that the ruling of the Court in the *Benton* case is not retroactive then the Court would be departing from pre-existing doctrine in refusing retroactive application within the federal system of the new rule ultimately laid down in the *Katz* case. Certainly if the Fifth and Fourteenth Amendments were violated or denied Benton, which this Court

says they were then by the same token or rule why would not they apply to Petitioner in the present case? It would be most unfair and certainly against this Court's position in prior cases before the Court where one's fundamental personal rights and liberties were involved. The *Benton* case rule is not new. It merely applied a well established constitutional principle closely analogous to those which have been previously considered in prior case law. For example and to state it more broadly, in every case, if not without exception, this Court has taken the position where one's constitutional rights were violated in the State Courts, as they came to this Court for review, this Court has said the Bill of Rights apply to state prosecutions. The present case before the Court is just such a case.

In the case of *North Carolina* v. *Pearce* decided by this Court June 23rd, 1969 (cite as 89 S. Ct. 2072 (1969) Supreme Court Reporter, West Publishing Company), Mr. Justice Stewart speaking for the Court said:—"The Court has today in *Benton* v. *Maryland*, 395 U.S. ——, 22 L Ed 2d —— said that the Fifth Amendment guarantee against double jeopardy is enforceable against the states through the Fourteenth Amendment. That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. And it protects against multiple punishment for the same offense." Mr. Justice Stewart further said that "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And there has never been any doubt of (this rule's) entire complete protection of the party when a second punishment is proposed in the same Court, on the same facts, for the same statu-

tory offense, that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense *as from being tried twice for it.*"

Mr. Justice Black in the North Carolina case above quoted stated on page 2082 that "Due process, moreover, is a guarantee that a man should only be tried and convicted in accordance with valid laws of the land. If a conviction is not valid under these laws, statutory and constitutional, a man has been denied due process and has a constitutional right to have the conviction set aside, without being deprived of life, liberty or property as a result."

In the case of *United States* v. *Ewell,* 383 U.S. 116, 124, 15 L. Ed. 2d 627, the Court said, "It was established, at an early date that the Fifth Amendment was designed to prevent an accused from running the risk of 'Double Jeopardy.'"

In the case of *North Carolina* v. *Pearce* decided June 23rd, 1969 (cite as 89 S. Ct. 2089 (1969), Supreme Court Reporter, West Publishing Company), on Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, Mr. Justice Douglas speaking for the Court said, "The ban on Double Jeopardy has its roots deep in the history of occidental jurisprudence." "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in Western civilization." *Bartkus* v. *Illinois,* 359 U.S. 121, 151-155, 3 L. Ed. 2d 684. And its purposes are several. It prevents the state from using its criminal processes as an instrument of harassment to wear the accused out by a multitude of cases with accumulated trial." *Abbate* v. *United States,* 359 U.S. 187, 198-199. It was further said in this case

that "It serves the additional purpose of precluding the state following acquittal, from successively retrying the defendant in the hope of securing a conviction." "The vice of this procedure lies in relitigating the same issue on the same evidence before two different juries, with a man's innocence or guilt at stake in the hope that they would come to a different conclusion." *Hoag* v. *New Jersey*, 356 U.S. 464, 474-475. "Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches." *Downum* v. *United States*, 372 U.S. 734, 736.

As in the *Green* case, Petitioner in the case now before the Court did not waive his constitutional defense of former jeopardy to a second prosecution simply because he voluntarily sought and obtained a reversal of a former illegal trial.

The argument here made by Petitioner in Certiorari with regard to the application of the Fifth and Fourteenth Amendments to the case now before the Court and the decisions quoted would appear to Petitioner to be irresistible to say nothing about the *Benton* case being retroactive.

In conclusion it is felt that for the reasons advanced in this Brief, that the Court should hold in the present case, as it did in the *Benton* case that the "Double Jeopardy" protection of the Fifth Amendment through the Fourteenth Amendment is applicable in this case. As was said in the case of *Malloy* v. *Hogan*, 378 U.S. 1, 10 (1963), "If the Fifth Amendment's prohibition against 'Double Jeop-

ardy' applies to state prosecutions, then the federal standard of enforcement of this protection must be complied with by the states." The "Double Jeopardy" prohibition is not against being twice punished, but against being twice put in jeopardy. It is submitted that the State of Georgia in the present case violated the federal standard for protection of Petitioner's right to be free from "Double Jeopardy".

Had Petitioner in Certiorari been tried the second time for a lesser offense rather than murder (Voluntary Manslaughter), it is felt that the Jury would have possibly given more serious consideration, and certainly continue debate as to Petitioner's innocence. By trying Petitioner the second time for murder, it gave the prosecution, the state, an unfair advantage of offering the Jury a choice—a situation that was apt to induce a doubtful Jury to find Petitioner guilty of a lesser offense rather than find him not guilty or acquitted or to even continue their deliberations or debate as to his innocence.

It is respectfully submitted that the rationale and reasoning in the case of *Benton* v. *Maryland* is equally applicable to the case presently before the Court. The Fifth and Fourteenth Amendments were held to be the law by this Honorable Court in the *Benton* case. Why would these two Amendments not be the law in the present case?

Conclusion

For the foregoing reasons, Petitioner in Certiorari submits that his conviction for Voluntary Manslaughter on October 20th, 1967, affirmed by the Appellate Courts of Georgia should be reversed.

Fiat Justitia Ruat Coelum.

Respectfully submitted,

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